

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 76 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

and

MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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UMARBHAI MOHAMMEDBHAI SHAIKH

Versus

STATE OF GUJARAT and ors.

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Appearance:

MR BC DAVE for the appellant

MR ST MEHTA, A.P.P. for Respondent No. 1

MR JV DESAI for Respondents No. 2, 3

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CORAM : MR.JUSTICE J.M.PANCHAL and

MR.JUSTICE M.H.KADRI

Date of decision: 27/11/96

ORAL JUDGEMENT: (Panchal,J.):-

By means of filing this appeal under section 378(4) of the Code of Criminal Procedure,1973, the

appellant, who is original complainant, has questioned legality and validity of judgment and order dated June 29,1984 rendered by the learned Additional Sessions Judge, Bharuch, in Criminal Appeal no.33/83 by which judgment rendered by the learned Judicial Magistrate, First Class, Rajpipla, in Criminal Case no.1288/81 convicting respondents no.2 & 3 under section 420 read with section 114 of the Indian Penal Code is set aside.

2. The appellant is a resident of Rajpipla town, District : Bharuch. The name of his son is Shaikh Abdul Habib. The son of the appellant has passed B.Sc. examination and at the relevant time, he was unemployed. The son of the appellant was desirous of settling in a foreign country. It is the case of the appellant that respondent no.3 met him at his house some time in the month of July, 1981 in the company of one Prafulbhai and represented to the appellant that Prafulbhai Patel was arranging to send boys to foreign country for services and was charging Rs.9,000/- for that purpose. The appellant has pleaded in the complaint that he was persuaded by respondent no.3 to give Rs.5,000/- to Prafulbhai Patel in the first instance. As son of the appellant was keen to settle in foreign country, the appellant agreed to the said proposal, but agreed to make payment of the amount to Prafulbhai after sometime, as at the relevant time he was short of funds. According to the appellant, on August 3, 1981, respondents no.2,3 and Prafulbhai went to the house of the appellant and on assurance being given by respondents no.2 & 3 that needful would be done by Prafulbhai, the appellant paid an amount of Rs.5,000/- to Prafulbhai, who passed necessary receipt for the same in favour of the appellant. The appellant did not hear any news till the end of August, 1981. He felt that he was cheated by the respondents no.2 & 3 as well as Prafulbhai and, therefore, made inquiries with respondents no.2 & 3. It is the case of the appellant that respondents no.2 & 3 represented to him that Prafulbhai had made arrangement for sending several boys to foreign country and would write to the appellant in short time. The appellant did not receive any letter from Prafulbhai. Under the circumstances, the appellant instituted a complaint in the Court of learned Judicial Magistrate, First Class, Rajpipla against respondents no.2 & 3 and prayed the Court to convict them under section 420 read with section 114 of the Indian Penal Code. The learned Magistrate examined the complainant on oath and reduced substance said examination to writing, and ordered to register the complaint filed by the appellant. It was registered as Criminal Case no.1288/81 in the Court of learned Judicial

Magistrate, First Class, Rajpipla. The learned Magistrate, after taking into consideration the contents of the complaint, issued bailable warrants against respondents no.2 & 3 in the sum of Rs.1,000/- for the offences punishable under sections 420 & 114 of the Indian Penal Code.

3. After service of warrants, respondents no.2 & 3 appeared before the Court of learned Magistrate. The learned Magistrate framed charge at exh.31 against respondents no.2 & 3 under section 420 read with section 114 of the Indian Penal Code. The charge was read over and explained to the respondents no.2 & 3, who pleaded not guilty to the charge and claimed to be tried. The appellant, therefore, examined himself at exh.7. In support of his case, the appellant also examined (1) Vasant Sadashivrao at exh.18, (2) Shaikh Abdul Habib at exh.23, and (3) Mustak Ahmed Amirakha Baluchi at exh.27. The appellant also led documentary evidence in support of his case pleaded in the complaint. After recording of evidence of witnesses was over, the learned Magistrate questioned respondents no.2 & 3 generally on the case and recorded their statements under section 313 of the Code of Criminal Procedure, 1973. In their statements, respondents no.2 & 3 denied the case pleaded by the complainant. However, no defence evidence was led by respondents no.2 & 3.

4. The learned Magistrate considered the evidence led by the complainant and concluded that offence punishable under section 420 read with section 114 of I.P.C. was made out against respondents no.2 & 3. In that view of the conclusion, the learned Magistrate convicted respondents no.2 & 3 by judgment and order dated April 30, 1986 under section 420 read with section 114 of I.P.C. and sentenced them to suffer R.I. for five months and pay a fine of Rs.750/- i/d. S.I. for two months. The learned Magistrate further directed that fine if paid, by the respondents no.2 & 3, be given as compensation to the appellant.

5. Feeling aggrieved by the order of conviction and sentence, respondents no.2 & 3 preferred Criminal Appeal no.33/83 in Sessions Court, Bharuch. The learned Additional Sessions Judge, Bharuch, who heard the appeal, has allowed the same by judgment and order dated June 29, 1984, giving rise to the present appeal.

6. Mr. B.C.Dave, learned Counsel appearing for the appellant, has taken us through the entire evidence on record. It was submitted that offence punishable under section 420 read with section 114 of I.P.C. is made out

by the appellant against respondents no.2 & 3 beyond reasonable doubt and, therefore, the appeal should be allowed. The learned Counsel for the appellant pleaded that the documents which were admitted in evidence by the learned Magistrate, have been wrongly ignored by the learned Appellate Judge and if those documents are taken into consideration, offence under section 420 read with section 114 of I.P.C. is clearly made out against respondents no.2 & 3. What was emphasised by the learned Counsel was that in absence of good grounds, conviction recorded by the learned Magistrate should not have been set aside by the first appellate court and, therefore, the appeal deserves to be allowed.

7. Mr. S.T.Mehta, learned A.P.P. has also submitted that clear case is made out against respondents no.2 & 3 for the offence punishable under section 420 read with section 114 of the Indian Penal Code and, therefore, the appeal filed by the appellant should be accepted by the Court. Mr. J.V.Desai, learned Counsel appearing for respondents no.2 & 3 has contended that documents at exhs.8, 9 & 11 are rightly ignored from consideration by the learned Judge and if those documents are ignored from consideration, then there is no evidence on the strength of which respondents no.2 & 3 can be convicted under section 420 read with sec.114 I.P.C. It was pleaded that cogent and convincing reasons have been given by the learned appellate Judge while acquitting respondents no.2 & 3 under section 420 read with section 114 of I.P.C. and in absence of good grounds, acquittal appeal should not be accepted by the Court. It was emphasised that offence, if any, was committed by Prafulbhai to whom the amount was allegedly given by the appellant and not by respondents no.2 & 3 and as there is no substance in the appeal, the same should be dismissed.

8. In order to prove case of cheating, the appellant relied on documents produced by him at exhs.8, 9 & 11. Exh.8 is a letter addressed by Prafulbhai Patel to the appellant. It is his case that said letter together with envelope was handed over to him by respondent no.3. The learned appellate Judge after taking into consideration the provisions of sections 45, 47 & 73 of the Indian Evidence Act, has rightly concluded that contents of letter exh.8 are not proved as required by law. Those reasons are to be found in para-9 of the impugned judgment. Even if one comes to the conclusion that contents of letter exh.8 are proved as required by law, in our view, no case can be said to have been made out by the appellant against respondents no.2 & 3 on the strength of said letter. If at all any case is made out,

it would be against Prafulbhai Patel, who is not prosecuted by the appellant for the reasons best known to him. Similarly, exh.11 is a letter purported to have been addressed by respondent no.2 to one Habibbhai. The learned Judge has rightly held that having regard to the principle of law laid down by the High Court in the case of SIDDHARTH MOHANLAL SHARMA v. SOUTH GUJARAT UNIVERSITY, 23 G.L.R. 233, learned Magistrate on comparison of handwritings, should not have come to the conclusion that letter exh.11 was addressed by respondent no.2. Even if one were to come to the conclusion that letter exh.11 was addressed by respondent no.2 to Habibbhai, that does not carry case of the appellant any further. The contents of the letter do not indicate in any manner that any offence punishable under section 420 I.P.C. is committed by respondent no.2. It is relevant to note that at the time when respondent no.3 met the appellant with Prafulbhai Patel in July, 1981, respondent no.2 was not present. Respondent no.2 for the first time saw the appellant in the company of respondent no.3 and Prafulbhai Patel only on August 3, 1981. Under the circumstances, no knowledge can be attributed to him as to what had transpired between the appellant, respondent no.3 and Prafulbhai Patel at the time when all the three met for the first time in July, 1981. We have carefully gone through the evidence of the appellant, which clearly shows that representation, if any, was made by the appellant to Prafulbhai Patel and not by respondents no.2 & 3. The finding recorded by the first appellate Court to the effect that Prafulbhai Patel had made representation to the appellant and not the respondents no.2 & 3, is eminently just and proper and deserves to be upheld. Where a charge of cheating rests upon a representation which is impugned as false and which relates not to an existing fact, but to a certain future event, it must be shown that the representation was false to the knowledge of the accused at the time when it was made. In our view, the appellant has failed to establish essential ingredients of section 415 of I.P.C. against respondents no.2 & 3. The view taken by the first appellate Court cannot be said to be illegal or perverse so as to warrant interference by this Court in the present appeal.

9. This is an acquittal appeal in which court would be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly when the evidence has not inspired confidence of learned

Judge. As we are in general agreement with the view expressed by the learned Judge, we do not think it necessary either to reiterate the evidence of prosecution witnesses or to restate the reasons for acquittal given by the learned Judge, and in our view, expression of general agreement with the view taken by the learned Judge would be sufficient in the facts of the present case. This is so, in view of the decisions rendered by the Supreme Court in the cases of (1) GIRIJA NANDINI DEVI & Ors. vs. BIJENDRA NARAIN CHAUDHARY, A.I.R. 1967 S.C. 1124, and (2) STATE OF KARNATAKA vs. HEMA REDDY AND ANOTHER, A.I.R. 1981 S.C. 1417. On overall appreciation of evidence, we are satisfied that there is no infirmity in the reasons assigned by the learned Judge for acquitting the respondents. Suffice it to say that the learned Judge has given cogent and convincing reasons for acquitting the respondents and the learned Additional Public Prosecutor has failed to dislodge the reasons given by the learned Judge in order to convince us to take the view contrary to the one already taken by the learned Judge. Therefore, acquittal appeal deserves to be rejected.

For the foregoing reasons, we do not find any substance in the appeal. The appeal fails and is dismissed.

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